Cent. Dig. §§ 1655-1659; Dec. Dig. § 418.* 5 Va.-W. Va. Enc. Dig. 720; 14 Va.-W. Va. Enc. Dig. 432.]

4. Equity (§ 67*)—"Laches"—Nature of Defense.—"Laches" is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim where no statute of limitations governs the case; and, upon such a defense the courts of equity act upon the doctrine of discouraging stale demands for the peace of society, and refusing to interfere where there has been gross laches in prosecuting a claim, or long acquieseence in the assertion of adverse rights. Laches cannot be excused but by showing some actual hindrance, caused by the fraud or concealment of parties in possession, which will appeal to the conscience of the chancellor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.* 9 Va.-W. Va. Enc. Dig. 94; 14 Va.-W. Va. Enc. Dig. 633; 15 Va.-W. Va. Enc. Dig. 596.

For other definitions, see Words and Phrases, vol. 5, p. 3972; vol. 8, p. 7700.]

Appeal from Circuit Court, York County.

Bill by S. S. Hogge and others, heirs of Thomas Hogge, Sr., against Copeland S. Shield and others. Decree for defendants, and complainants appeal. Affirmed.

Maryus Jones and *S. O. Bland,* both of Newport News, for appellants.

F. S. Collier, of Hampton, and *J. W. Friend,* of Newport News, for appellees.

WATER FRONT COAL COMPANY, Inc., *v.* SMITHFIELD MARL, CLAY & TRANSPORTATION CO.

Jan. 16, 1913.

[76 S. E. 937.]

1. Appeal and Error (§ 190*)—Objection below—Necessity.—An objection to an affidavit for attachment cannot be urged on appeal where not made in the circuit court, where it could have been amended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216-1220; Dec. Dig. § 190.* 1 Va.-W. Va. Eng. Dig. 556; 14 Va.-W. Va. Enc. Dig. 87; 15 Va.-W. Va. Enc. Dig. 62.]

2. Attachment (§ 107*)—Affidavit—Sufficiency.—Under Va. Code 1904, § 2959, which provides that the plaintiff, his agent or attorney,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

shall make an affidavit for attachment stating that the claim is believed to be just, and, where it is to recover a debt or damages for breach of contract or for a wrong, stating a certain sum which (at least) the affiant believes the plaintiff is entitled to recover, an affidavit by plaintiff's agent, stating a cause of action to recover a certain sum which affiant believed plaintiff was entitled to or ought to recover, but omitting the words "at least," was sufficient.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 285-289; Dec. Dig. § 107.* 2 Va.-W. Va. Enc. Dig. 93.]

3. Corporations (§ 507*)—Service of Process—Sufficiency.—A return upon summons to defendant to the effect that no officers of the defendant company, or any person on whom there might be service, was within the county, and that execution thereof was made by delivering a true copy to the wife of an agent for the company, such agent not then being found at his usual place of business and abode, shows insufficient service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.* 12 Va.-W. Va. Enc. Dig. 220; 15 Va.-W. Va. Enc. Dig. 898.]

4. Attachment (§ 209*)—Return—Service and Publication.—Code 1904, § 2979, provides that when an attachment is returned executed, and defendant has not been served with a copy thereof or with process in the suit wherein the attachment issued, an order of publication shall be made against him. The circuit court quashed process in a suit and remanded the case to rules to be matured by alias process, and continued the attachment proceeding thereunder, and the case was so matured and docketed for trial, and the court then on defendant's special appearance and motion quashed the attachment on the ground that the attachment had not been properly served on defendant, or the case matured by order of publication, and made an order that publication should be issued immediately. The action was not abated, and on trial the plaintiff obtained judgment. Held that, as personal service of the alias process had been obtained before the suit was abated, there had been no discontinuance of the action or failure to comply with the Code provision.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 675-687, 690, 691; Dec. Dig. § 209.* 2 Va.-W. Va. Enc. Dig. 110.]

Error to Circuit Court, Isle of Wight County.

Action by the Water Front Coal Company, Incorporated, against the Smithfield Marl, Clay & Transportation Company. From an order quashing the process in the main suit, remanding the case to rules to be matured by alias process, and continuing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Iidexes.

the attachment proceedings, plaintiff brings error. Reversed and rendered.

R. T. Thorp, of Norfolk, for plaintiff in error.
E. R. F. Wells, of Norfolk, for defendant in error.

Note.

Affidavit for Attachment—Averment That Affiant Is "Plaintiff, His Agent or Attorney."—The correct practice requires the affidavit for attachment to aver that the affiant is the "plaintiff, his agent or attorney," according to the fact, and a compliance with this rule imposes no undue hardship upon the attaching creditor. Damron *v.* Citizens National Bank, 112 Va. 544, 72 S. E. 153; Taylor *v.* Sutherlin-Meade Code, 107 Va. 787, 60 S. E. 132.

Same—Averment as to Justice of Demand.—Under a code provision requiring the affidavit for attachment to state the amount which the affiant believes the plaintiff is justly entitled to recover, the term "justly" is not superfluous or insignificant, but it is a matter of qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used in order to constitute a substantial compliance with the statute. Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753.

The omission of the word "justly" is ground for quashing the affidavit. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787.

Attachment proceedings are not, however, void because the affidavit fails to say that the claim is "just." Miller *v.* White, 46 W. Va. 67, 33 S. E. 333.

In Clinch River Mining Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660, quoted in the principal case, the Virginia Supreme Court held that "affidavits as to the ground of attachment are always strictly construed, and any omission of the requirements of the statute is fatal to the attachment; but, if the language of the affidavit necessarily implies the fact, it is sufficient. Hence an affidavit 'that the claim is just,' and 'that the defendant is converting,' etc., is a sufficient compliance with a statute which requires an affidavit 'that the claim is believed to be just,' and 'that to the best of affiant's belief defendant is converting,' etc."

Under the West Virginia statute of 1867, ch. 118, § 1, requiring the affidavit to state that the plaintiff's claim is just, it is sufficient if the affidavit state that "the plaintiffs are justly entitled to recover." Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

In Kennedy *v.* Morrison, 31 Tex. 207, quoted in the principal case, the attachment was quashed below because the affiant did not state that the defendant was "justly," indebted, as required by statute. On appeal, however, this was reversed, the court saying: "The pleadings of the plaintiff in the attachment filed under oath must show conclusively to the court a certain amount 'justly' due. And whether or not it is justly due does not depend upon the sworn statement of the party of the justness, but upon the proper allegations of the indebtedness, showing the same to be just, and this statement to be under oath, and this we conceive the plaintiff has done. There can be no doubt that any court would upon demurrer to the petition, decide that the defendant was 'justly,' indebted to plaintiff agreeably to the statement in the petition."

Same—Averment as to Amount of Indebtedness—Use of Phrase "at Least," "as Near as May Be," etc.—In West Virginia it has been held, in several decisions, that where the affidavit for an attachment,

in designating the amount which the affiant believes the plaintiff is entitled to recover, omits the words "at the least," contain in the statute (W. Va. Code, ch. 106, § 1) and uses no words equivalent thereto, such defect is fatal and the attachment should be quashed. Neill *v.* Rogers Bros., etc., Co., 41 W. Va. 37, 23 S. E. 702; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

In Coursor *v.* Parker, 39 W. Va. 521, 20 S. E. 583, "at least," is held to be synonymous with, and fairly equivalent to, the phrase "at the least," as used in the statute relating to such affidavits.

In Grover *v.* Buck, 34 Mich. 519, quoted in the principal case, the court held that "an affidavit for a legal attachment which states justly the amount due over and above all legal set-offs, is not objectionable for want of the qualifying words, 'as near as may be.' The affiant states the sum 'as near as may be' when he states it exactly."

NORFOLK &. W. RY. CO. et al. *v.* INTERSTATE R. CO.

Jan. 16, 1913.

[76 S. E. 940.]

Corporations (§ 394*)—Review—Questions of Fact—State Corporation Commission.—In view of the constitutional provision that the action of the State Corporation Commission shall on appeal be regarded as "prima facie just, reasonable and correct," a finding which the evidence does not fairly show to be unwarranted will not be disturbed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.* 1 Va.-W. Va. Enc. Dig. 609; 14 Va.-W. Va. Enc. Dig. 100; 15 Va.-W. Va. Enc. Dig. 72.]

Appeal from State Corporation Commission.

From a final order of the State Corporation Commission which established the right of the Interstate Railroad Company to take by condemnation proceedings certain property of the Norfolk & Western Railway Company and others for its line through the town of Norton to a connection with the Wise Terminal Railroad Company, and for depot and other facilities, the Norfolk & Western Railway Company and others appeal. Affirmed.

J. I. Doran, of Philadelphia, Pa., *A. S. Brandeis,* of Louisville, Ky., *E. M. Fulton,* of Wise, *W. A. Northcutt,* of Louisville, Ky., *L. H. Cocke* and *C. T. Duncan,* both of Wise, for appellants.

Bullitt & Chalkley, of Big Stone Gap, for appellee.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.